SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-991

SUNNYSIDE SCHOOL DISTRICT No. 12, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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THE UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 29, 1973.

OPINIONS BELOW

Neither the Findings of Fact and Conclusions of Law of the District Court nor the opinion of the Court of Appeals are reported at this time.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on August 29, 1973, and a copy thereof is appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Petitioner brought suit in the Superior Court of the State of Arizona to enjoin The Honorable Jack Williams, Governor and as such Commander-in-Chief of the Arizona Air National Guard from directing or permitting certain training flights over the public junior high school owned and operated by petitioner. While the suit was pending, respondent commenced an action in the District Court to enjoin the proceedings in the Superior Court of the State of Arizona. The District Court granted respondent's prayer for a preliminary injunction on the ground that petitioner's state court suit threatened to result in the issuance of an injunction which might conflict with "exclusive federal jurisdiction" over aircraft operations of the Arizona Air National Guard. The Court of Appeals affirmed on the basis of *City of Burbank v. Lockheed Air Terminal,* ....US .... 93 S. Ct. .... 36 L. Ed. 2d 547 (1973).

The questions presented are:

1. Would an injunction issued against the Governor of the State of Arizona in his capacity as Commander-in-Chief of the Arizona Air National Guard imposing some restraint upon initiating flights at certain times or under certain conditions necessarily conflict with or violate the federal Constitution or federal statute or any validly promulgated regulation?

2. Is the present case controlled by *City of Burbank v. Lockheed Air Terminal,* .... US ...., 93 S. Ct. ...., 36 L. Ed. 2d 547 (1973)?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Supremacy clause (U.S. Const. art. VI, cl. 2); the Commerce Clause (U.S. Const. art. I, Sec. 8, cl. 3); 49 U.S.C. 1301 et seq., and particularly 49 U.S.C. 1431; and 14 C. F. R. Pts. 71-77, 91-97 are the basis of the preemption holding in *City of Burbank v. Lockheed Air Terminal, Inc.,* .... U. S. ...., 93 S. Ct. ...., 36 L. Ed. 2d 547 (1973) and are necessarily involved herein.

STATEMENT

Sunnyside Junior High School, operated by petitioner, is adjacent to Tucson International Airport. The Arizona Air National Guard flies training flights out of Tucson International Airport which disrupt the educational process at Sunnyside Junior High School. Governor Jack Williams of the State of Arizona is the Commander-in-Chief of the Arizona Air National Guard. In March, 1971, petitioner commenced an injunction proceeding against Governor Jack Williams in his capacity as Commander-in-Chief of the Arizona Air National Guard seeking injunctive relief with respect to the training flights.

The defendant challenged the jurisdiction of the trial court to proceed in an original extraordinary writ proceeding in the nature of prohibition in the Arizona Court of Appeals. The intermediate Arizona appellate court adopted the view of the defendant Williams that the trial

court was without jurisdiction to proceed, based upon the concept of federal preemption. *Williams v. Superior Court,* 15 Ariz. App. 480, 489 P.2d 854 (1971) On review, however, the Supreme Court of Arizona reversed the Court of Appeals, *Williams v. Superior Court,* 108 Ariz. 154, 494 P.2d 26 (1972), and remanded the cause for a decision on the merits. After remand and prior to decision, respondent here filed its complaint in the District Court praying that the state court proceeding be enjoined (See generally respondent's Complaint for Injunctive Relief, R. 3-7, and Findings of Fact and Conclusions of Law, R. 81-84). The District Court granted a preliminary injunction (R. 85). Petitioner appealed to the Court of Appeals. The Court of Appeals affirmed in a one-sentence opinion citing only *City of Burbank v. Lockheed Air Terminal,* supra.

REASONS FOR GRANTING THE WRIT

The basic reasons why the writ should be granted are simple. Regulation of aircraft movement is one thing. It is concededly essential that the power to regulate aircraft motion be vested in the national government, which is the only government capable of exercising power coterminous with the limits of aircraft flight potential. Congress has met this need with legislation. 49 U.S.C. 1301 et seq.

Regulation of aircraft flight is one thing; the power or right to initiate or order that a flight should be made (if regulatorily possible) is another. This power to initiate is one step anterior to the power of regulation. It is necessarily subject to the power of regulation. It is this power to initiate or order that flights be made in the first instance, and not the plenary regulatory power of the federal government which petitioner seeks to harness in the state court proceeding.

This is not a case where, if the power of a locality to act were approved, it would necessarily portend an interference with or misregulation of interstate commerce. *City of Burbank v. Lockheed Air Terminal, Inc.,* supra. In that case there was the spectre of a patchquilt of local ordinances, all perhaps reasonable from the standpoint of the individual localities, which would necessarily play havoc with unified national regulation of flight. Interstate commerce is not by allegation or finding involved in this case. Thus, while a local regulation which attempts to prohibit the initiation (or termination) of flight can offend against the commerce clause, that kind of attempted regulation is not present here.

The trial judge found that the Arizona Air National Guard was an organizational component of the Air National Guard of the United States which is a reserve component of the United States armed forces. There was no finding or conclusion, however, that the defendant in the state court litigation was anything but a state officer. The National Guard during peacetime is a state entity. See *Williams v. Superior Court,* 108 Ariz. 154, 494, P.2d 26, (1972) and cases cited therein.

Inasmuch as relief was sought in the state court only against a state official, there was no reason to grant injunctive relief in the District Court on the basis of interference with federal military functions. The Court of Appeals affirmed solely on the basis of *City of Burbank v. Lockheed Air Terminal, Inc.,* supra.

The writ should be granted because the Court of Appeals has misconstrued and misapplied the decision of this Court in *City of Burbank v. Lockheed Air Terminal, Inc.,* supra. The *Burbank* decision should be clarified so that it cannot be interpreted as enlarging upon the proper limits of exclusive federal control.

As is emphasized in the first paragraph of the *Burbank* opinion, preemption is a rule of necessity. The technological and economic nature of commerce by air "imperatively demands" and "admits only of one uniform system, or plan or regulation." *City of Burbank v. Lockheed Air Terminal, Inc.*, supra, 36 L. Ed. 2d at 549, quoting from *Cooley v. Board of Wardens*, 12 How. 299, 319, 13 L. Ed. 996,(1851). *City of Burbank* recognized simply that the federal scheme by which air commerce is regulated would be subverted by a fragmentation by localization of the scheduling power.

States, including state courts, are not ousted from their jurisdiction unless such is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). Here, petitioner sought in the state court some species of injunctive relief against a State official, relative to his role in the initiation of certain training flights. It is of course impossible to anticipate the nature or effect of any order which might have been entered. The lower courts' holding that the state officials' acts are immune from any kind of state court restraint simply because they were subsequently carried out in accordance with federal regulations is to put the regulatory cart before the initiating horse.

Preemption is at bottom a practical concept. Even where state regulation is only supplementary to a national legislative purpose, it is of course intolerable if it creates anomalies, inconsistencies, conflicts and uncertainties as to what is the controlling authority. In the present case, however, the exercise of state court jurisdiction sought by petitioner would not create these problems. An order by the state court directed to a state official to, for example, halve flights during certain school hours could in no sense be impossible or difficult of regulatory accommodation and could

not reasonably be viewed as thwarting or interfering with the purposes of 49 USC § 1431 discussed in *Burbank*, supra.

The *City of Burbank* case should be clarified so as to permit local resolution of controversies between local interests of controversies such as the present one, when such controversies are without implication or effect upon those aspects of aircraft flight and air commerce which must necessarily be nationally and uniformly controlled.

CONCLUSION

It is respectfully resquested that the writ be granted, and that the injunction entered herein be dissolved; and that the injunctive proceeding be dismissed or the District Court be directed to permit the state court proceeding at issue to proceed regularly to adjudication.

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(Appendix Follows)

Appendix

Filed May 23 '72

United States District Court For The District of Arizona

Civil Action No. 72-47-Tucson

United States of America,
Plaintiff,

v.

Sunnyside School District No. 12,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff is the United States of America. The Department of the Air Force is a military department of the United States. The Federal Aviation Administration (hereinafter referred to as F.A.A.) is an agency of the United States.

2. The Air National Guard, pursuant to 10 U.S.C. § 261, is a reserve component of the United States armed forces. The Arizona Air National Guard is an organizational component of the Air National Guard of the United States.

3. Defendant, Sunnyside School District No. 12 (hereinafter referred to as school district) is a public entity and political subdivision organized and existing under the laws of the State of Arizona. Sunnyside Junior High School is operated and controlled by defendant school district, and is located in proximity to Tucson International Airport. Said school is located under and within the geographical area controlled by the F.A.A. for aircraft operations at Tucson International Airport.

4. Defendant school district is plaintiff in an action styled *Sunnyside School District No. 12 v. Governor Jack A. Williams, Commander-in-Chief, National Guard of Arizona,* No. 125520, now pending in the Superior Court of the State of Arizona, in and for Pima County. The school district seeks by that action to permanently enjoin the Arizona Air National Guard, except in emergency situations, from taking off or landing within the airspace immediately above or in close proximity to the school. Decisions have been rendered by the Arizona Court of Appeals (15 Ariz. App. 480, 489 P.2d 854) and the Supreme Court of Arizona (494 P.2d 26). The Pima County, Arizona Superior Court has held final hearings on the merits of the action. Neither the United States nor any agency or officer thereof was a party to the state court action.

5. The Tucson Airport Authority operates and controls the Tucson International Airport, which is in the National Airport System Plan. The F.A.A. has developed and administers a comprehensive air traffic control system for Tucson International Airport pursuant to the authority granted in the Federal Aviation Act of 1958 (49 U.S.C. 1301 *et seq.*).

6. The Arizona Air National Guard, pursuant to agreement with the Tucson Airport Authority, has facilities at and operates from Tucson International Airport. A portion of the activities of the Arizona Air National Guard at Tucson International Airport is the training of Air National Guard F-100 pilots. Said training is conducted by employees of the United States in conformity with standards and directives of the Department of the Air Force promulgated pursuant to federal law. Said training program is the only Air National Guard F-100 combat crew training school in the United States, and is vital to the mission of the Air Na-

tional Guard and the United States Air Force in fulfilling their roles in the total defense posture of this country.

7. Tucson International Airport provides necessary and ideal facilities and location for the mission of the Arizona Air National Guard. In operating from said Airport, Arizona Air National Guard aircraft are required to and do fully comply with and conform to regulations and directives of the United States Air Force, the F.A.A. and local F.A.A. control tower personnel. The Arizona Air National Guard also complies with the Formal Runway Use Program implemented by the F.A.A. at Tucson International Airport to alleviate noise, particularly with respect to Sunnyside Junior High School.

Conclusions of Law

1. The United States of America, through the F.A.A., possesses and exercises complete and exclusive national sovereignty in the airspace of the United States, 49 U.S.C. Section 1508(a). The entire scheme of federal legislation, regulation and actual operation of controlling aircraft is so pervasive and comprehensive that Congress has, by adoption of the Federal Aviation Act of 1958 (49 U.S.C. 1301 *et seq.*) preempted the field to the exclusion of local regulation. *Lockheed Air Terminal, Inc. v. City of Burbank,* No. 71-1242, decided March 22, 1972, Ninth Circuit Court of Appeals.

2. The aircraft operations of the Arizona Air National Guard in performing the training program under the supervision of federal employees and pursuant to Air Force standards and directives, are activities performed pursuant to federal laws, regulations, policies and directives.

3. The action brought by defendant school district in state court, styled *Sunnyside School District No. 12 v. Governor Jack A. Williams, Commander-in-Chief, National Guard of Arizona,* threatens to result in an injunction against such training flights. Such an injunction might conflict with the exclusive federal jurisdiction over such aircraft operations, and might be violative of the Supremacy Clause of the Constitution.

4. There is a substantial likelihood that the plaintiff will prevail ultimately on the merits of this action.

5. The public interest favors the issuance of a preliminary injunction.

6. Plaintiff has no adequate remedy at law.

Dated May 23, 1972

/s/ JAMES A. WALSH
United States District Judge

United States Court of Appeals for the Ninth Circuit

No. 72-2533

United States of America,
Appellee,

vs.

Sunnyside School District No. 12,
Appellant.

ORDER

[August 29, 1973]

Appeal from the United States District Court
District of Arizona

Before: HUFSTEDLER, KILKENNY and CHOY, Circuit Judges.

The judgment of the lower court is affirmed on the authority of *City of Burbank, et al. v. Lockheed Air Terminal, Inc., et al.*, ... U.S. .... (May 14, 1973).